

82 - 1839

Office - Supreme Court, U.S.  
FILED

MAY 11 1983

ALEXANDER L. STEVAS,  
CLERK

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ZELVERN W. MANN, ADMINISTRATOR OF THE ESTATE  
OF ADA CREWS MANN, DECEASED, PETITIONER

V.

RICHARD GOLD, M.D., et al., RESPONDENTS,

DAVID H. CANTER, etc., et al, RESPONDENTS;

CONSOLIDATED FOR HEARING

APPENDIX PAGES (RECOPIED, TYPEWRITTEN,  
PER PHONE INSTRUCTIONS OF EDWARD C. SHADE,  
DEPUTY CLERK) FOR ATTACHMENT TO PETITION  
FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

Kenneth Crews Mann  
*Attorney at Law*  
*Member of the Bar*  
*of this Court*  
P. O. Box 5350  
Sherman Oaks, CA 91413  
(213) 906-2266

May, 1983

ATTORNEY FOR PETITIONER

C O P Y

RECEIVED

NOV 12 1982

DO NOT PUBLISH Harrington, Foxx,  
Dubrow & Canter

UNITED STATES COURT OF APPEALS FILED

NOV 10 1982

FOR THE NINTH CIRCUIT

PHILLIP B. WINBERRY

|                                   |   |                   |
|-----------------------------------|---|-------------------|
| ZELVERN W. MANN,                  | ) | NO. 82-5110       |
| Plaintiff-Appellant,              | ) |                   |
| vs.                               | ) | D.C. NO.          |
| RICHARD GOLD, M.D., JOSHUA LEVY,  | ) | CV 81-5461 R      |
| M.D., JOHN CARLSON, M.D., BERNARD | ) |                   |
| STROHM, ADMINISTRATOR, UCLA       | ) | <u>MEMORANDUM</u> |
| HOSPITAL AND CLINICS, ANDREA      | ) |                   |
| CRACCHIOLO III, M.D., and STANLEY | ) |                   |
| CASSAN, M.D.,                     | ) |                   |
| Defendants-Appellees.             | ) |                   |

Submitted -- November 3, 1982

Appeal from the United States District Court  
for the Central District of California  
Honorable Manuel Real, District Judge, Presiding  
Before: GOODWIN, HUG and BOOCHEVER, Circuit Judges.

The appellant is the administrator of his wife's estate. The decedent allegedly died as a result of mistreatment and neglect by the staff of UCLA Hospital. Appellant brought a state court action for medical malpractice, which

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resulted in a summary judgment in favor of the defendants. Appellant then brought this action under 42 U.S.C. § 1983. The district court dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The district court also awarded attorney's fees to the defendants. We affirm the dismissal on jurisdictional grounds and the award of attorney's fees.

Appellant contends that the district court erred in concluding that the defendant did not act under color of state law. Appellant's contention reduces to this: The defendants acted under color of state law because they were state employees. This precise contention was recently rejected by the Supreme Court in Polk County v. Dodson, 102 S.Ct. 445 (1981). Appellant's reliance on Estelle v. Gamble, 429 U.S. 97 (1976) and O'Connor v. Donaldson, 422 U.S. 563 (1975) is misplaced. In both of these cases,

COPY

the state hospitals were custodial.

42 U.S.C. § 1988 allows a district court, in its discretion, to grant a reasonable attorney's fee to the "prevailing party" in a section 1983 case. In Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam), the Supreme Court held that a defendant may recover his attorney's fees from the plaintiff only if the district court finds that the plaintiff's action was frivolous, unreasonable, or without foundation. Applying this standard, the district court was within its discretion in granting attorney's fees in this case.

The judgment of the district court is  
AFFIRMED.

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FILED

DEC 06 1982

PHILLIP B. WINBERRY  
Clerk, U. S. COURT OF  
APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

|                                   |   |                  |
|-----------------------------------|---|------------------|
| ZELVERN W. MANN, Administrator    | ) | No. 82-5110      |
| of the Estate of ADA CREWS MANN,  | ) |                  |
| deceased,                         | ) | D.C. No.         |
| Appellant,                        | ) | CV 81-5461 R     |
| v.                                | ) |                  |
|                                   | ) |                  |
| RICHARD GOLD, M.D., JOSHUA LEVY,  | ) | <u>O R D E R</u> |
| M.D., JOHN CARLSON, M.D., BERNARD | ) |                  |
| STROHM, ADMINISTRATOR, UCLA       | ) |                  |
| HOSPITAL AND CLINICS, ANDREA      | ) |                  |
| CRACCHIOLO III, M.D., and STANLEY | ) |                  |
| CASSAN, M.D.,                     | ) |                  |
| Appellees.                        | ) |                  |

The memorandum disposition in the above-entitled case is amended by changing that portion of the caption relating to the appellant to read:

ZELVERN W. MANN, Administrator of the Estate  
of ADA CREWS MANN, deceased,

Appellant,

The remainder of the caption remains as in the original.

APPENDIX A

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C O P Y

DO NOT PUBLISH

FILED

NOV 10 1982

PHILLIP B. WINBERRY  
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

|                                   |   |              |
|-----------------------------------|---|--------------|
| ZELVERN W. MANN,                  | ) | NOS. 82-5182 |
| Plaintiff-Appellant,              | ) | 82-5195      |
| vs.                               | ) |              |
| DAVID CANTER, LISA CARL, DALE     | ) |              |
| GOLDFARB, individually, DAVID H.) | ) |              |
| CANTER, sole corporation, LISA    | ) | MEMORANDUM   |
| CARL, sole corporation, HARRING-  | ) |              |
| TON FOXX, DUBROW & CANTER, a      | ) |              |
| legal partnership; JOSEPH A.      | ) |              |
| WAPNER; DAVID N. EAGLESON,        | ) |              |
| judge, ELI CHERNOW, judge,        | ) |              |
| PETER S. SMITH, judge,            | ) |              |
| Defendants-Appellees.)            | ) |              |

Submitted -- November 3, 1982

Appeal from the United States District Court  
For the Central District of California  
Honorable Manuel Real, District Judge Presiding

Before: GOODWIN, HUG and BOOCHEVER, Circuit Judges.

Appellant is the administrator of his deceased  
wife's estate. Appellant brought suit in the  
state court for wrongful death due to medical

COPY

malpractice, which concluded in a summary judgment in favor of the defendants. Appellant filed suit in the federal court pursuant to 42 U.S.C. § 1983, alleging that various state court judges, a retired state court judge acting as a discovery referee, the state court defendants' lawyers and their law firm conspired to wreck appellant's state court action. The judicial defendants, including the discovery referee, were dismissed on the basis of judicial immunity. The attorney defendants were granted summary judgment and a dismissal on the basis that they did not act under color of state law. The district court properly dismissed the judicial defendants and granted summary judgment in favor of the attorney defendants, and we therefore affirm the judgment of the district court.

Judges are entitled to absolute immunity against § 1983 suits so long as they perform judicial acts and do not act in clear absence

of all jurisdiction. Dennis v. Sparks, 449 U.S. 24 (1980), Stump v. Sparkman, 435 U.S. 349 (1978). The discovery referee is also immune when acting as an aide to a judge and performing judicial acts in place of the judge. Gravel v. United States, 408 U.S. 606 (1972).

Rule 56(e) of the Federal Rules of Civil Procedure provides that when a motion for summary judgment is supported by affidavits, plaintiff may not rest upon the mere allegations of his pleading, but must respond with affidavits or otherwise setting forth specific facts showing that there is a genuine issue for trial. The attorney defendants specifically denied any bribery, conspiracy, concealment, or secret meetings. For the most part, appellant has not responded at all to these specific denials. Where appellant has responded by affidavit, he has used facts beyond the affiant's personal knowledge or otherwise incompetent or inadmissible matters. The



district court properly concluded that there were no triable issues of fact.

Federal Rules of Civil Procedure 56(f) allows a judge discretion to order a continuance of a motion for a summary judgment while depositions are taken. However, the district judge was within his discretion in refusing discovery prior to granting summary judgment in this case where it is difficult to envision how the depositions requested would have yielded any admissible evidence which would have contradicted the specific denials of the attorney defendants.

Appellees' motion for deamages and double costs pursuant to Federal Rules of Appellate Procedure No. 38 is granted because the appeal is frivolous. Appellees are awarded double costs plus damages in the amount of \$500.

The judgment of the district court is AFFIRMED.

COPY

UNITED STATES COURT OF APPEALS      FILED  
FOR THE NINTH CIRCUIT      FEB 10 1983  
                                 PHILLIP B. WINBERRY  
                                 CLERK, U.S. COURT OF APPEALS

ZELVERN W. MANN, Administrator      ) No. 82-5110  
of the Estate of Ada Crews Mann,      )  
deceased,      ) D.C. No.  
                 Appellant,      ) CV 81-5461R  
                 v.      )  
                 )  
RICHARD GOLD, M.D., JOSHUA LEVY,      ) ORDER  
M.D., JOHN CARLSON, M.D., BERNARD)  
STROHM, ADMINISTRATOR, UCLA HOS- )  
PITAL AND CLINICS, ANDREA      )  
CRACCHIOLO III, M.D., and STANLEY)  
CASSAN, M.D.,      )  
                 Appellees.      )  
                 )

---

Before: Judges GOODWIN, HUG and BOOCHEVER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing is rejected.

[signed] Robert Boochever  
United States Circuit Judge

UNITED STATES COURT OF APPEALS      FILED  
FOR THE NINTH CIRCUIT      FEB 10 1983  
                                 PHILLIP B. WINBERRY  
                                 Clerk, U. S. COURT  
                                 OF APPEALS

|                                     |   |              |
|-------------------------------------|---|--------------|
| ZELVERN W. MANN, Administrator      | ) | Nos. 82-5182 |
| of the Estate of ADA CREWS MANN,    | ) | 82-5195      |
| deceased,                           | ) |              |
| Appellant,                          | ) | <u>ORDER</u> |
| v.                                  | ) |              |
| DAVID H. CANTER, LISA CARL, DALE    | ) |              |
| GOLDFARB, individually, DAVID H.    | ) |              |
| CANTER, sole corporation, LISA      | ) |              |
| CARL, sole corporation, HARRINGTON, | ) |              |
| FOXX, DUBROW & CANTER, a legal      | ) |              |
| partnership; JOSEPH A. WAPNER;      | ) |              |
| DAVID N. EAGLESON, judge, JOHN      | ) |              |
| COLE, judge, ELI CHERNOW, judge,    | ) |              |
| PETER S. SMITH, judge,              | ) |              |
| Appellees.                          | ) |              |

Before: Judges GOODWIN, HUG and BOOCHEVER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

[signed] Robert Boochever  
United States Circuit Judge

COPY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ZELVERN W. MANN, Administrator  
of the Estate of Ada Crews Mann,  
deceased

VS Plaintiff(s)

RICHARD GOLD, M.D., JOSHUA LEVY,  
M.D., JOHN CARLSON, M.D., BERNARD  
STROHM, ADM., ETC., ET AL.

Defendant(s)

CASE NUMBER

CV 81-5461 MLR

FILED  
FEB 22 1983  
Clerk, U.S.  
District  
Court,

NOTICE OF HEARING ON Central  
FILING AND SPREADING District  
JUDGMENT OF COURT of Californ  
OF APPEALS (CIVIL)

TO: Kenneth Crews Mann, Esq.  
P. O. Box 116  
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HARRINGTON, FOX, DUBROW  
& CANTER  
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Los Angeles, CA 90017

PLEASE TAKE NOTICE that the judgement of the  
United States Court of Appeals, Ninth Circuit,  
having been received in the above-entitled  
case, this matter has been set for hearing on  
March 28, 1983 at 10:00 A.M. o'clock before  
the Honorable MANUEL L. REAL, United States  
District Judge, in Courtroom No. 14, United  
States Courthouse, 312 N. Spring Street, Los  
not [sic]  
Angeles, California. It will/ be necessary  
for all counsel to be present at that time.

EDWARD M. KRITZMAN, CLERK

Dated: FEBRUARY 22, 1983 By: (signed) Magette Laskir

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NOTICE OF HEARING ON FILING AND SPREADING JUDGMENT  
Civ 42 (11/76) OF COURT OF APPEALS

APPENDIX C

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COPY

JUDGMENT

UNITED STATES COURT OF APPEALS  
For the Ninth Circuit

ZELVERN W. MANN, Administrator  
of the Estate of ADA CREWS MANN,  
deceased,  
Plaintiff/Appellant,

vs.

RICHARD GOLD, M.D., JOSHUA LEVY,  
M.D., JOHN CARLSON, M.D. BERNARD  
STROHM, ADMINISTRATOR, etc., et al.,

Defendants/Appellees.

LODGED  
FEB 14 1983

No. 82-5110

DC CV81-5461MLR

APPEAL from the United States District Court  
for the Central District of California

THIS CAUSE came on to be heard on the Trans-  
cript of the Record from the United States  
District Court for the Central District of  
California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here  
ordered and adjudged by this Court, that the  
judgment of the said District Court in this  
Cause be, and hereby is affirmed.

Filed and entered  
November 09, 1982

A TRUE COPY  
ATTEST  
PHILLIP B. WINBERRY  
CLERK, US COURT OF APPEALS  
Clerk of Court  
by: [signed] Betty Miller  
Deputy Clerk

COPY

JUDGMENT

---

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ZELVERN W. MANN,

Plaintiff-Appellant,

vs.

DAVID H. CANTER, et al,

Defendants-Appellees.

82-5182

No. 82-5195

D.C. #CV 81-4689 MLRL

APPEAL from the United States District Court  
for the CENTRAL District of CALIFORNIA.

THIS CAUSE came on to be heard on the Trans-  
cript of the Record from the United States Dis-  
trict Court for the CENTRAL District of CALIFORNIA  
and was duly submitted.

ON CONSIDERATION WHEREOF, It is no here ordered  
and adjudge by this Court that the judgment of the  
said District Court in this Cause be, and hereby  
is AFFIRMED

|                         |
|-------------------------|
| A TRUE COPY             |
| ATTEST                  |
| PHILLIP B. WINBERRY     |
| Clerk, U.S. COURT OF    |
| APPEALS                 |
| Clerk of Court          |
| [signed]                |
| by: <u>Betty Miller</u> |
| Deputy Clerk            |

Filed and entered NOVEMBER 10, 1982

APPENDIX C

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COPY

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

---

ZELVERN W. MANN

CASE NUMBER

FILED

CV 81-4689 MLRL

FEB 22 1983

Plaintiff(s)

vs

DAVID H. CANTER, ET AL.,

NOTICE OF HEARING ON FILING  
AND SPREADING JUDGMENT OF  
COURT OF APPEALS (CIVIL)

Defendant(s)

TO: Kenneth Crews Mann, Esq.  
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Bruce Ogden Mann, Esq.  
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Laguna Hills, CA 92653

PLEASE TAKE NOTICE that the judgment of the United States Court of Appeals, Ninth Circuit, having been received in the above-entitled case, this matter has been set for hearing on March 28, 1983 at 10:00 A.M. o'clock before the Honorable MANUEL L. REAL, United States District Judge, in Courtroom No. 14, United States Courthouse, 312 N. Spring Street, Los Angeles, California.  
not [sic]

It will/ be necessary for all counsel to be present at that time.

EDWARD M. KRITZMAN, CLERK

Dated: February 22, 1983 By: [signed]

Martette Laskir  
Deputy Clerk

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NOTICE OF HEARING ON FILING AND SPREADING  
Civ 42 (11/76) JUDGMENT OF COURT OF APPEALS

APPENDIX C

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